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No.

IN THE

Supreme Court of the United States

October Term, 1982

CHRIS ALLEN FRITZ,

Petitioner,

versus

HAGERSTOWN REPRODUCTIVE HEALTH SERVICES, et. al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented.

There are four questions presented for review:

A. Do we get from a reading of *Roe v. Wade* and progeny that this Court ever meant to mandate abortion on demand—i.e. were there not some contingencies appended thereto?

B. Was the instant case properly found to be moot by the Maryland Court where the subject matter thereof is capable of recurring, yet evading judicial review and moreover, where the couple have reconciled and are living together as man and wife, though they still hold divergent views on the question presented by this case?

C. Did not this Honorable Court itself in *Roe v. Wade, Danforth, Colautti,* and progeny intend that the threshold of viability remain flexible, to change with evolving science, which is more quixotic and mercurial than the law, and is the new science of in vitro fertilization just such a change in man's scientific knowledge as foreshadowed by the opinions of this High Court?

D. Are the rights of Petitioner father and his unborn child under the Fifth and Fourteenth Amendments of the United States Constitution violated by a finding of mootness by the Maryland court?

Parties.

The parties to this cause are those whose names appear in the caption above.

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OCTOBER TERM, 1982.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

Opinions Below.

The Court of Appeals entered its Memorandum decision declining to decide the case on the basis of mootness on Jan. 24, 1983. A copy of the Memorandum is attached as Appendix A, page A1.

Petitioner filed a timely Motion For Reconsideration and Stay of Mandate which was denied by the Maryland Court on February 4, 1983. A copy of Petitioner's Motion for Reconsideration is attached as Appendix B.

Jurisdiction.

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3).

Constitutional Provisions Involved.

The following provisions of the United States Constitution are involved in this case:

Amendment V.

> ". . . nor be deprived of life, liberty, or property, without due process of law."

Amendment XIV, Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Maryland statutory provisions regulating the performance of abortions are codified as Maryland Code, Section 20-207 through 20-214 of the Health General Article.

Statement of the Case.

This action was commenced by a Petition in Equity filed by the father of a child against his wife and a commercial abortion clinic. The Petition alleged that the proposed action was "against (petitioner's) rights as father of the child" and further alleged, inter alia, that the fetus was "a 'person' as that term is described and defined in the Fourteenth Amendment." Upon this verified

Petition, the Court issued, as authorized by Maryland BB Rules, a 48-hour restraining order. Within the period of the restraining order, the case came on for evidentiary hearing, both defendants having been duly served, and appearing by separate counsel. At the evidentiary hearing, the defendant, Bonny Ann Fritz, adduced no proof of evidence other than evidence by stipulation similar to that adduced by the female plaintiff in *H.L. v. Matheson*, 101 S.Ct. 1164 (1981) "that she desires an abortion . . . and that a physician would be willing to perform the abortion" (101 S.Ct. at 1175 (Powell and Stewart, JJ., concurring).* She thus championed no cause, save her own.

A decision against her claim endangers the cause of no woman with good reasons, or for that matter, any explicated reasons for seeking an abortion.

At the time of the hearing in the lower court the respondent, Bonny Ann Fritz, was twenty (20) years of age, in excellent health, and the mother of a nine and one half month old child who is also in perfect health. She suffered from no medical impairments nor was she in an emergency condition. She had two and one half weeks remaining in her first trimester of pregnancy. She adamently sought an abortion of the unborn child, which was the subject matter of these proceedings, for reasons of personal convenience in connection with her employment. Although unemployed at the time of the hearing, she was seeking employment and sought this abortion so that she could be employed in the immediate future and not have to lose time from work.

The individuals hereto are legally married to one another, although separated at the time of the hearing below. They reconciled following the abortion and before this case came on for oral argument before the Maryland Court of Appeals on January 5, 1983.

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*This case, a private equity proceeding, unlike the decided cases of this Court, involves no vagueness issues and no criminal statute. Even if this were not true, defendants failure to adduce reasons for choice would deny them standing to attack the decision of the Maryland Circuit Court on any basis other than the bald proposition that in no case may an equity court interfere with an abortion clinic implementing the unexplicated decision of a married woman voluntarily conceiving during wedlock not to bear her husband's child. H.L. v. Matheson, 101 S.Ct. at 1169 (opinion of the court) and at 1175 (concurring opinion).

They remain reconciled and living together, although they continue to hold divergent views on the subject matter of this petition.

The Circuit Court, after hearing extensive testimony adduced by the Plaintiff, granted Plaintiff an injunction on a form presented by Plaintiff. At the request *of counsel for the abortion clinic*, the court amended the order to insert the language "unless the Husband should later consent in writing, subject to further order of court." By a motion filed and denied prior to docketing of the Notice of Appeal, Plaintiff requested that this language be stricken, noting that the Petition seeks to protect the life of the child and disclaiming any interest in having the right to terminate that life.*,**

The Court, also acting at the request of counsel for the abortion clinic, deleted from the form of order language requiring the mother to file in the proceedings the birth certificate of the child when born. This language was sought in order to indicate to the court the point at which there had been full compliance with its order and at which closing of the case would be appropriate.

The order of the Circuit Court for Washington County was entered on September 17, 1982, at approximately 2:20 o'clock p.m. An appeal was noted in the Court of Special Appeals of Maryland at approximately 4:30 o'clock p.m. on that date, and the decision and order of the presiding judge of the Court of Special Appeals was entered at 4:50 o'clock p.m. on the same

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*The language was sought by counsel for appellants to create the appearance of a "husband's veto" like that condemned in *Planned Parenthood v. Danforth.* Although the language is surplusage, even taken at its face value, it does not present the Danforth situation. There is a great difference between a statute according to a husband a veto in all cases and a decree requiring his consent after a weighing of equities by the Court in a case where the wife's good health is conceded and she has asserted no reason at all for desiring an abortion. cf. *Bellotti v. Baird,* 428 U.S. 132 at 146 (1976), 443 U.S. at 645 (1909).

**By a second motion, also filed before the docketing of the appeal, plaintiff sought the appointment of his attorney for a person not in being, pursuant to, inter alia, MD Rule 275(a), reciting the absence of any adverse interest.

date, being twenty (20) minutes later. Counsel for the petitioner was not notified of the filing of the appeal and counsel for the petitioner was not aware of the decision and order of the Court of Special Appeals until heard on a Baltimore television station at 11:00 p.m. on September 17, 1982.

All of the appeal action took place in a matter of minutes, and in derogation of petitioner's rights. Petitioner was not represented in the Court of Special Appeals, in violation of Maryland Rule 1055e2 and all of the rules of that court which require notice; basic rules of fair play were not complied with in a matter involving such a serious matter as the abortion of an unborn child, and petitioner avered in his Petition for Writ of Certiorari to the Circuit Court for Washington County Maryland that his constitutional rights under the due process and equal protection clauses of the Federal Constitution and his rights under the Maryland Declaration of Rights were not complied with.

Setting aside the injunction of the trial court, a single judge of the Court of Special Appeals of Maryland effectively cleared the way for an immediate mooting of petitioner's cause.

In order to preserve the life of the unborn child who was the subject of this controversy, a Petition for Certiorari was filed by the Plaintiff and an order thereon was issued by the Maryland Court of Appeals on Saturday, September 18, 1982, at approximately 11:45 a.m. granting the Petition for Certiorari and reinstating the Circuit Court injunction pending argument and decision in the Maryland Court of Appeals.

Defendants subsequently, on the day before scheduled argument, filed an unsworn Suggestion of Mootness, a document significant for what it omits. The document does not disclose the time or place the abortion was performed or the identity of the person performing the abortion and his affiliation with the defendant clinic. Under the circumstances, this must be deemed an acknowledgement that the Order of the Maryland Court of Apeals was flouted by the defendants.

Defendant Hagerstown Reproductive Health Services was advised of the proceedings before the Maryland Court of Appeals in a telephone call from counsel for Plaintiff at 11:28 a.m. on Saturday, September 18, 1982. Defendants have not disclosed when the abortion was performed by this facility or by another facility recommended by it, in or out of Maryland. cf. *Regal Knitwear v. N.L.R.B. Staff*, 324 U.S. 9 (1945), 42 F.2d. 632, 633 (2d Cir. 1930); Annotation, *Who are persons "in active concert or participation" with parties to action so as to be bound by order granting an injunction*, 97 A.L.R.2d 490 (1962). The abortion clinic's counsel represented to the court at the time of the conference call that "the suspicion is quite strong" that defendant was unavailable, and affidavits annexed to Plaintiff's Opposition to Motion to Dismiss As Moot reveal the concealment of defendant's whereabouts.

Constitutional law questions raised below.

The petition filed in the Circuit Court below alleged that the proposed termination of life of the fetus was against petitioner's rights and the rights of his unborn child under the Fifth and Fourteenth Amendments of the United States Constitution.

The Petitioner's Writ of Certiorari to the Circuit Court for Washington County Maryland argued that his constitutional rights under the due process and equal protection clause of the Federal Constitution had been violated.

The Petitioner further reiterated these rights and raised a denial of equal protection of the laws under the Fourteenth Amendment in the following language in his Motion for Reconsideration and For Stay of Mandate:

> "Henceforth, alleged constitutional rights, at least those expected to engage the sympathy of some members of this court, will be vindicated not through legal process but through a regime of snatch and grab and devil take the hindmost. Having regard to the immunity conferred by

the court upon the conduct of appellants here, it is plain that, to use the language of the *Lloyd* decision, 'upon any recurrence the same difficulty which prevented the appeal at hand from being heard in time was likely again to prevent a decision.'"*

ARGUMENT.

A. Do we get from a reading of *Roe v. Wade* and progeny that this Court ever meant to mandate abortion on demand—i.e. weren't there some contingencies appended thereto?

The conceded complete absence of a health justification for an abortion in the instant case vitiates an argument that *Roe v. Wade* is applicable. Mr. Justice Stewart observed for five members of the court in *Harris v. McRae*, 448 U.S. 297, 316, 100 S. Ct. 2671, 2688 (1980), "Because even the compelling interest of the state in protecting potential life after fetal viability was held to be insufficient to outweigh a woman's decision to protect her life or health it could be argued that the freedom of a woman to decide whether to terminate a pregnancy for health reasons does in fact lie at the core of the constitutional right identified in *Wade*." Justice Stevens, in his dissenting opinion in the same case described the woman's right as "a right to place a higher value on avoiding serious harm to her own health or perhaps an abnormal childbirth than on protecting potential life." (448 U.S. at 351, 100 S. Ct. at 2713 (1980).

The language of *Roe v. Wade* itself expands at length on the woman's health interests while explicitly denying the constitutional right to 'bodily integrity' vainly sought, there and here, by amici curiae National Organization of Women, et al. Justice Stevens' description of the health-based nature of the *Roe* decision in *Harris v. McRae* is fully convincing.

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*Petitioner's Motion for Reconsideration of Stay of Mandate, p.A 10—entire Motion reproduced in page A12, appended hereto.

It is highly significant and revealing that nowhere in the three briefs totaling 100 pages filed in support of appellant's position is there citation of, let alone discussion of, any opinion of this Court on the abortion issue decided more recently than 1979. Yet, since then, this Court has decided, inter alia.:

H.L. v. Matheson	450 U.S. 398 101 S.Ct. 1164 (1981)
Harris v. McRae	448 U.S. 297 110 S.Ct. 2671 (1980)
Williams v. Zbaraz	448 U.S. 358 100 S.Ct. 2694 (1980)

Nor, except for the unconvincing efforts to distinguish the *Colautti* case in one of the three briefs is there any reference to any post-1976 case. Missing is any discussion of:

Beal v. Doe	432 U.S. 438 97 S.Ct. 2366 (1977)
Maher v. Roe	432 U.S. 464 97 S.Ct. 2376 (1977)
Poelker v. Doe	432 U.S. 519 97 S.Ct. 2391 (1977)

For appellants, the more than 200 pages in the United States Reports occupied by the decisions in these cases do not exist and the progress of the law in this field stopped in 1976. But subsequent decisions make entirely clear the limited nature of any abortion right and its roots in health concerns. Indeed, in *Doe v. Bolton*, 410 U.S. at 189, the Supreme Court expressly declared "a pregnant woman does not have an absolute constitutional right to an abortion on her demand" and in *Roe v. Wade* it stated "if an individual medical practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available."

B. Was the instant case properly found to be moot by the Maryland Court where the subject matter thereof is capable of recurring, yet evading judicial review and moreover, where the couple have reconciled and are living together as man and wife, though they still hold divergent views on the question presented by this case?

Roe v. Wade clearly establishes that termination of a pregnancy at issue in a case either by birth or by abortion does not render an abortion case moot. In *Roe v. Wade* this Court stated:

> When, as here, pregnancy is a significant fact in the litigation, the normal 226-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination mades a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could "be capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S. Ct. 279, 283, 55 L.Ed. 310 (1911).

The attempt by appellants to distinguish the mootness holding of *Roe v. Wade* on the basis that it involved a class action not present here must fail. As noted in *United States Parole Commission v. Geraughty*, 445 U.S. 388-398, 100 S. Ct. 1202, 1209, "The 'capable of repetition, yet avoiding review' doctrine was developed outside the class action context. *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 514-15 (1911)." See *Moore v. Ogilvie*, 394 U.S. 814 (1969).

There is compelling evidence that the individual defendant was purposely sequestered to avoid learning of a court Order and that counsel actively advised a rush to perform the abortion to avoid subsequent judicial decision. It also appears that the abortion, when performed, was performed following the entry of the Order of the Maryland Court of Appeals.

Although *Roe v. Wade* is direct authority for a conclusion of nonmootness, that authority is reinforced by the general Maryland Rule with respect to moot questions. Unlike the Federal courts, the Maryland courts are not confined by a constitutional "case or controversy" requirement. As stated in *Lloyd v. Board of Supervisors of Elections*, 206 Md. 36, 111 A.2d. 379, 382, "those which we regard as the better considered and reasoned cases take the view that only where the urgency of establishing a rule of future conduct in matters of important public concern is imperative and manifest, will there be justified a departure from the general rule and practice of not deciding academic questions. They hold that if the public interest will be clearly hurt if the question is not immediately decided, if the matter involved is likely to recur frequently, and its recurrence will involve a relationship between government and citizens, or a duty of government, and upon any recurrence, the same difficulty which prevented the appeal at hand from being heard in time was likely again to prevent a decision, then the court may find justification for deciding the issues raised by a question which has become moot particularly if all these factors concur with sufficient weight." These factors all concur here, together with willful and contumacious destruction of the subject matter of this case, explainable only by a desire to avoid the Maryland Court's reasoned judgment and ultimately the delineation of the reasoned judgment of this Court.

C. Did not this Honorable Court itself in *Roe v. Wade, Danforth, Colautti*, and progeny intend that the threshold if viability remain flexible, to change with evolving science, which is more quixotic and mercurial than the law, and is the new science of in vitro fertilization just such a change in man's scientific knowledge as foreshadowed by the opinions of this High Court?

The explosion of the science of fetology and the advent of in vitro fertilization now mandate that this Court redelineate its flexible (with science) viability standard, as enunciated in *Roe, Danforth,* and *Colautti.* In *Roe*, this Court held that an Unborn was not a person. This Court went on to hold, however, that an Unborn was to be considered viable at the point in time when it could live by "natural or artificial means outside the womb."

Viability was further held to be the point in time that triggered the state's right to prohibit abortion except in the instance of protection of the life and health of the mother: "If the state is interested in protecting fetal life after viability, they may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." *Roe v. Wade*, 410 U.S. 113, 163–164.

There initially arose some confusion about this definiation on the part of judges throughout the country who were called upon to interpret it as to whether or not viability was based upon a numerical number of months mentioned in *Roe* in discussing the viability concept or whether it was meant to be flexible. This question was answered in *Danforth*, where the Court stated: "We recognized in Roe that viability was a matter of medical judgment, skill, and technical ability; and we preserve the flexibility of the term." *Danforth*, 428 U.S. 52, 64.

The decision in *Colautti v. Franklin*, 99 S. Ct. 675 (1979) with its insistence upon a flexible determination of the viability of an unborn child, poses an interesting question regarding biotechnological developments which have pushed the time frame of the ability to sustain life outside the womb by natural or artificial means all the way back to the moment of conception itself.

It is of further note that the "flexibility" preferred by this Court is not one intended to stretch only with time and place, as when freedom of speech in a nation at peace is contrasted with freedom of speech in a nation at war, or when the right of privacy in the seclusion of one's home is contrasted with the right of privacy in a public place. This present flexibility is established so that scientific advances, more quixotic and mercurial than the law, may be utilized to delineate viability.

In tracing the evolution of this Court's concept of viability, it is interesting to note that as to whether or not the fetus is alive Justice Blackmun stated:

> "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of

> medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Roe v. Wade*, 410 U.S. 113, 159.

Since *Roe* there has been an evolution in this Court's concept of viability. The Missouri Criminal Abortion Statute challenged in *Danforth* defined viable as "that stage of fetal development when the life of the Unborn child may be continued indefinitely outside the womb by natural or artificial life supportive systems." The Court found that this definition did not conflict with Roe's use of the term viability. It is of note that the *Danforth* definition referred to contains "life" of the Unborn child, while Roe stated that only potential life was at issue (428 U.S. at 63 citing MO Ann. Stat. §188.05 (2) Vernon, 1974). This shift from potential life to continuing life occurred without any comment by this Court and apparently indicates that this Court may implicitly be acknowledging that the fetus is alive.

Colautti contains more demonstrable evidence that this Court's thinking on the question of viability has indeed evolved. Justice Blackmun mentioned in *Colautti* that "The state has a compelling interest in the life or health of the fetus," rather than in the "potential" life of the fetus as described in Roe. More importantly, *Colautti's* definition of viability refers to the fetus as having "reasonable likelihood of . . . sustaining survival," while Roe referred to a fetus as being "potentially able to live." Reasoning this out, it follows that a fetus would be "potentially able to live" without having to be presently alive, but to speak of a fetus "surviving" implies that life already exists in utero, since in order to survive something must already be alive.

This switch to living inside the womb and surviving extra utero is on record in the *Anders v. Floyd* remand, where the court stated that viable "refers to potential, rather than actual survival of the fetus outside the womb." The high court has switched from the fetus being "potentially able to live" to the fetus being "potentially able to survive."

Thus, this court has admitted that the standard for viability must be flexible and must be construed according to scientific advances.

While this court has joined in the debate of the question of whether or not the earliest beginning of all of us are alive, or a person, or viable, and while it has conceded that it must be considered viable when it can demonstrate to us of its own life forces that it is capable of surviving and performing its metabolic functions and growing and evolving and living as we know it outside the womb, it is of note that medical science has been given a whole new technology—that of in vitro fertilization, by which a female ovum is extracted from a woman and fertilized in a Petri dish outside of the womb, with a male sperm, creating a conceptus, the beginnings of a new human being. This new technology has allowed women who otherwise were incapable of bearing children to become pregnant and has blessed many otherwise childless couples with children of their own.*

Coming at a time when our nation is debating the *Roe v. Wade* decision and when the energies in our national government are deferred from their proper duties of overseeing the economy and national defense, to the consideration of the passage in the Congress of a Constitutional amendment and many state legislators of the U.S. have passed resolutions calling for the convening of a constitutional congress to pass an amendment to the Constitution to strike down *Roe v. Wade*, it should give man pause to reflect that an unanticipated spin-off of this new technology has been to establish by independent, demonstrable, scientific proof that this new life is not an appendage of the mother, as her appendix or kidney, but rather is a separate, distinct, living human being, separate and apart from the mother, which indeed controls even the pregnancy itself. The mother is not more than the supply ship to which this young astronaut in utero attaches his umbilical cord (and in point of fact the child in being literally builds an umbilical cord and attaches it to the wall of the uterus). See Appendix, page A 17, "Test-Tube Babies Are Babies," Dr. Jerome LeJeune.

*See *Life* Magazine, November, 1982, "The Test Tube Baby Boom—Elizabeth Carr—America's First Test Tube Baby."

The new human life is conceived in a Petri dish, outside the womb, is then incubated from 48 hours to seven days and during this period of time must of accord fulfill and prove to man all of his questions about its viability to have meaningful, independent life and to grow (cell division is taking place during this 48-hour period). Many other processes that man cannot even perceive or know with his present knowledge take place during this 48-hour to seven day period of incubation. We know them only by words such as chromosomes and DNA in the 1980's.

The conceptus has human life on its own, independently, (albeit with artificial means—the incubator). If this were not true, the child could not be born at the end of nine months as a normal, perfectly formed human being. Elizabeth Carr, as America's first in vitro fertilization miracle, is living proof of this fact as we see her on the front page of the November, 1982, issue of *Life Magazine*, holding in her hands the Petri dish in which she was conceived, sitting in a laboratory where her life began, looking at us in all of her beaming glory.

D. Are the rights of Petitioner father and his unborn child violated under the Fifth and Fourteenth Amendments of the United States Constitution by a finding of mootness by the Maryland Court?

In the instant case, the Petitioner sought and obtained a permanent restraining order precluding the termination of life of the fetus in the Circuit Court. A sole judge of the Maryland Court of Special Appeals, acting individually and without notice to the petitioner or opportunity for a hearing under the Maryland rules, stayed the order of the Circuit Court judge, all without any authority for him so to do as enunciated by the Court of Appeals itself at oral argument and as more specifically spelled out by Judge Smith in the dissenting opinion of the Maryland Court of Appeals. Such action is violative of the rights of the father and his unborn child under the due process clause of the Fourteenth Amendment and is further violative of the basic values implicit in the concept of ordered liberty. Such arbitrary and capricious denials deprived Petitioner and his unborn child of "liberty"

without due process of law guaranteed by the Fourteenth Amendment and demeans the marriage relationship.

The Maryland Court has not decided but has rather decided not to decide on the basis of mootness. The decision to go out on mootness was by a four to three vote in the Maryland Court of Appeals. Thus, the instant petitioner father and all other fathers similarly situated are faced with a possible reoccurrence of this same issue without the benefit of judicial resolution and without a determination of their rights under the Fifth and Fourteenth Amendments of the United States Constitution, including the right to equal protection of the laws embodied in the Fourteenth Amendment. Three judges of the Maryland Court of Appeals in their dissent stated that, in their opinion, this case fell within the exception to mootness as enunciated in *Lloyd v. Board of Supervisors of Elections,* 206 Md. 36, 43, 11 A 2d 379 (1954), and stated in pertinent part " . . . a well understood principle in this State is that when a given set of facts is likely to recur frequently and upon the recurrence the same difficulty which prevented the appeal at hand from being heard in time is likely to again prevent a decision, then the Court may find justification for deciding the issues raised by a question which has become moot."

Equal protection of the laws mandates adjudication on the merits since, in the instant case, given the fact of the reconciliation of petitioner and his spouse, which was brought out in oral argument before the Maryland Court of Appeals, and given the additional fact that although the parties themselves have reconciled, they have not resolved their inherent difference of opinion on this vital issue to their marital union, the likelihood of a recurrence of this issue and a rush to moot the issue on the part of the wife is alive and ever present.

The equal protection clause would indeed be a formula of empty words if the finding of mootness by the Maryland court in the instant case were allowed to stand. The *Lloyd* exception to the mootness rule under Maryland case law (citing cases and authority of this Court) delineates the standard in which the facts of the instant case clearly fall and which was cited by Judge Smith

in his dissent to the mootness holding of the Maryland Court of Appeals, Appendix B, p.A 7. To apply the *Lloyd* exception arbitrarily and decide to hear some cases which otherwise would be moot while declining to hear other cases is to contravene the stout-hearted guarantees of the equal protection clause.

The Maryland Court of appeals, in finding mootness, simply abrogated all constitutional rights of the petitioner and failed to heed the language of its own predecessors in *Lloyd*: "Despite its consistent dismissal of moot cases, the Supreme Court of the United States has refused to dismiss a case which is moot as to the parties, where it found the concurrence in sufficient weight of the factors which together add up to the exception. *Southern P. Terminal Co. v. Interstate Com. Com.*, 219 U.S. 498, 55 L.Ed. 310, 316; *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 41 L.Ed. 1007."

Reasons for Granting Writ.

In the instant case the Petitioner, Chris Fritz, has reconciled with his wife, Bonny Fritz, and they are again living together as man and wife. The likelihood that this is going to recur in the instance of this particular couple or other individuals without the benefit of getting judicial resolution of the issue is highly likely.

Given the set of facts under which the lawyers for the woman get her into an abortion clinic forthwith and the highest court of the State of Maryland has held that such an issue is moot on the grounds that the child has already been aborted, we would have a situation where the woman could go ahead and obtain an abortion—even be in contempt of the order precluding such an abortion—and still obtain an abortion and then we are presented with an additional question: Is the abortion aspect moot? This places all fathers in a dilemma.

If this matter is allowed to stand as moot, it is going to evade judicial scrutiny, though capable of recurring.

Prayer for Relief.

WHEREFORE, the Petitioner prays that this Court:

1. Order a Writ of Certiorari issued to the Court of Appeals of the State of Maryland to review the ruling and reverse the Maryland State court with directions that they proceed to a determination on the merits.

2. Grant the Petitioner costs and such other and further relief as the Court may deem just and proper.

Dated: Hagerstown, Maryland
April 25, 1983

Respectfully submitted,

R. MARTIN PALMER, JR.
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APPENDIX A

Memorandum Decision of the Maryland Court of Appeals, dated January 24, 1983.

IN THE COURT OF APPEALS OF MARYLAND

No. 80

September Term, 1982

HAGERSTOWN REPRODUCTIVE HEALTH SERVICES
and
BONNY ANN FRITZ

v.

CHRIS ALLEN FRITZ

Murphy, C.J.
Smith
Eldridge
Cole
Davidson
Rodowsky
Couch, J.J.

Opinion by Eldridge, J.
Smith, Cole and Davidson, J.J., dissent

Filed: January 24, 1983

On September 15, 1982, Chris Allen Fritz filed in the Circuit Court for Washington County a "Petition to Preclude Termination of Life of Fetus." Named as defendants were Bonny Ann Fritz and Hagerstown Reproductive Health Services. The petition alleged that Bonny Ann Fritz was pregnant, and that the plaintiff was her husband and "the father of the unborn child." It further alleged that Bonny Ann Fritz had, earlier that day, gone to Hagerstown Reproductive Health Services for the purpose of having an abortion. The petition concluded that the contemplated abortion was "against the wishes" of the plaintiff and "against his rights as father of the child."

After a hearing, the Circuit Court on Friday, September 17, 1982, ordered "that the Defendants, Hagerstown Reproductive Health Services and Bonny Ann Fritz, are hereby precluded and restrained from terminating the life of the unborn infant, which is the subject of these proceedings, unless the husband, Chris Allen Fritz, should later consent in writing . . . " The defendants immediately appealed to the Court of Special Appeals. Later the same day, September 17, 1982, a single judge of the Court of Special Appeals stayed the injunction issued by the Circuit Court and directed that the Circuit Court record be forwarded to the Court of Special Appeals by Tuesday, September 21, 1982.

The next day, Saturday, September 18, 1982, the plaintiff, Chris Allen Fritz, filed in this Court a petition for a writ of certiorari, coupled with a request that we stay the order of the Court of Special Appeals. Later that day we granted the petition for a writ of certiorari, stayed the order of the Court of Special Appeals, directed that the trial court record be forwarded to this Court by 10:00 a.m. Monday, September 20, 1982, and set the case for oral argument on Monday at 1:00 p.m. *Fritz v. Hagerstown Repro. Health Serv.*, 294 Md. 346, 450 A.2d. 906 (1982).

On the following day, Sunday, September 19, the defendant filed in this Court a motion to "dismiss the writ of certiorari" on the ground of mootness. The motion stated "that on September 18, 1982, Appellee Fritz, having no notice of the Order of this

Court entered on that day, and acting pursuant to the Order of the Court of Special Appeals . . . entered on the previous day, obtained an abortion, thus rendering the cause herein moot." Upon receipt of the defendant's motion, we canceled the hearing scheduled for September 20.

On September 21, 1982, this Court denied the defendants' motion to dismiss "without prejudice to the rights of the parties to argue mootness" in the briefs and at oral argument. The September 21 order, concurred in by a majority of the judges of this Court, directed that briefs be filed and the case be argued "in the normal course of time." In addition to any other issues which the parties deemed relevant, the Court specifically directed that the parties brief and argue four questions. One of those four questions concerned the matter of mootness. *Hagerstown Repro. Health Serv. v. Fritz*, 294 Md. 347, 450 A.2d. 906 (1982).[1] In accordance with the order, briefs were filed and the case has been argued.

As pointed out above, the question whether this action should be dismissed on the ground of mootness was not finally decided by our order of September 21, 1982. Instead, the majority of the Court believed that the matter should not be resolved until full briefing and argument. The case, including the question of dismissal for mootness, has now been fully briefed and argued. In our view, the action should be dismissed on the ground of mootness.

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[1]The issues set forth in our order were as follows (294 Md. at 347–348):

1) Did the trial court err in enjoining Bonny Ann Fritz from having an abortion performed including the issues subsumed therein:

a) Whether a husband has the right under either the Constitution of the United States or otherwise by law to challenge his wife's decision to have an abortion.

b) Whether the child abuse laws of Maryland apply to a fetus being aborted.

2) Whether a single Maryland appellate judge is vested with the power and authority to stay the order of a trial court.

3) Whether this cause is moot."

The instant case is clearly moot under the test set forth in our decisions. *Attorney Gen. v. A.A. Co. School Bus*, 286 Md. 324, 327, 407 A.2d. 749 (1979) ("A question is moot if, at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide"), and cases there cited. The real issue is whether a decision should be rendered on the merits of the case despite its being moot.

Generally when a case is moot, an appellate court will order that it be dismissed. *Attorney Gen. v. A.A. Co. School Bus*, supra, 286 Md. at 327; *Bishop v. Governor*, 281 Md. 521, 524, 380 A.2d. 220 (1977); *Reyes v. Prince George's County*, 281 Md. 279, 291-292, 330 A.2d. 12 (1977); *State v. Ficker*, 266 Md. 500, 507, 295 A.2d. 231 (1972); *Lloyd v. Supervisors of Elections*, 206 Md. 36, 39-44, 111 A.2d. 379 (1954). This Court has decided the merits of a moot case in only a very few instances. See the discussion in *Lloyd v. Supervisors of Elections*, supra, 206 Md. at 39-41.

Before deciding the merits of a moot case, we must be persuaded that there exists an "urgency of establishing a rule of future conduct in matters of important public concern" which "is both imperative and manifest." *State v. Ficker*, supra, 266 Md. at 507. We are not persuaded at this time that the present case falls within such category.

Unlike many controversies with respect to abortion, this case involves no state or local statute dealing with abortions. Compare, e.g., *H. L. v. Matheson*, 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d. 388 (1981); *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d. 797 (1979); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d. 788 (1976); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d. 147 (1973);

Kindly v. Governor of Maryland, 289 Md. 620, 426 A.2d. 908 (1981); *Bayne v. Secretary of State,* 283 Md. 560, 392 A.2d. 67 (1978).[2]

There has been no showing that the particular issues raised in this case "may frequently recur," *Attorney Gen. v. A.A. Co. School Bus,* supra, 286 Md. at 328. Finally, the brief trial court record in this case presented an inadequate foundation for many of the specific contentions advanced at oral argument before us.

We are not at this time convinced that the case presents unresolved issues of public importance, which are likely to recur, and for which there is a manifest urgency of establishing a rule of future conduct.

Order of the Court of Special Appeals vacated. Case remanded to the Court of Special Appeals with directions that it vacate the judgment of the Circuit Court for Washington County and remand the case to that court with directions that the cause be dismissed as moot. Costs to be paid by Petitioner-Appellee, Chris Allen Fritz.

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[2]Neither side in this case has advanced any argument based upon the Maryland statutory provisions regulating the performance of abortions, presently codified as Maryland Code (1982), 1982 Cum. Supp.), §§20-207 through 20-214 of the Health-General Article. See *State v. Ingel,* 18 Md.App. 514, 308 A.2d. 223, cert. denied, 270 Md. 739, 742 (1973); *Vuitch v. Hardy,* 472 F.2d. 1370 (4th Cir. 1973); cert. denied. 414 U.S. 824, 94 S.Ct. 126, 38 L.Ed.2d. 57 (1973); 62 Op. Att'y Gen. 3 (1977).

IN THE COURT OF APPEALS OF MARYLAND

No. 80

September Term, 1982

HAGERSTOWN REPRODUCTIVE HEALTH SERVICES
and
BONNY ANN FRITZ

v.

CHRIS ALLEN FRITZ

Murphy, C.J.
Smith
Eldridge
Cole
Davidson
Rodowsky
Couch, J.J.

Dissenting opinion by Smith, J., in which Cole and Davidson, J.J., concur

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Filed: January 24, 1982

I agree that we do not sit to decide moot cases or to render advisory opinions on abstract points of law. However, a well understood principle in this State is that when a given set of facts is likely to recur frequently and upon the recurrence the same difficulty which prevented the appeal at hand from being heard in time is likely to again prevent a decision, then the Court may find justification for deciding the issues raised by a question which has become moot. See statements to that effect in, among other cases, *Reyes v. Prince George's County*, 281 Md. 279, 300, 380 A.2d. 12 (1977); and *Lloyd v. Supervisors of Elections*, 206 Md. 36, 43, 111 A.2d. 379 (1954).

The fact that the number of abortions is fast increasing may be gleaned from the testimony of one of the witnesses produced here by the husband who said that he had participated in 60,000 abortions. The first trimester of pregnancy is involved in cases such as the one at bar. Therefore, when another case arises time again will be an important factor if a decision is to be rendered.

It is well and good to say, as it was at oral argument in this case, that courts can expedite cases such as these but the fact remains that time is a factor. On important issues such as this there should be adequate time to brief, to argue, and then for the Court to research and to reflect before announcing its opinion. I submit that the type of issue here presented well exemplifies the exception to the mootness rule announced in cases such as *Lloyd*. It is the kind of issue which is likely to recur without sufficient time for regular briefing and argument. The public importance or public interest is demonstrated by the unusually large attendance at oral argument, the more than average coverage provided by the press, the fact that radio and television saw fit to have their equipment in the courtroom, and that there were several briefs amici curiae filed in this case.

We have a responsibility to decide such an important legal question in order that parties to potential controversies such as this may know their rights and that trial judges presented with issues such as in this case may know whether they should follow the well publicized opinion of the trial judge here. It should be

emphasized, however, for the benefit of those who may not fully understand our role, that we are not a legislature. There is a problem of constitutional law involved here. Thus, our decision would not be based upon our own personal predilections of what might be best or best for the marriage relation but would be based upon our understanding of the decisions of the Supreme Court in matters such as this.

In have no hesitancy in saying that in my view the decision in the trial court in this case runs contrary to the holdings of the Supreme Court under the Constitution of the United States in *Planned Parenthood of Missouri v. Danforth,* 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed. 2d. 788 (1976); *Doe v. Bolton,* 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d. 201 (1973); and *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d. 147 (1973). Also, I know of no authority for a single appellate judge in this State to stay the order of a trial court.

I am authorized to state that Judges Cole and Davidson concur in the views here expressed.

APPENDIX B

Petitioner's Motion for Reconsideration and For Stay of Mandate and Court's denial of same, dated February 2, 1983.

CHRIS ALLEN FRITZ	*	IN THE
vs.	*	COURT OF APPEALS
HAGERSTOWN REPRODUCTIVE HEALTH SERVICES	*	OF MARYLAND
and		
BONNY ANN FRITZ		

MOTION FOR RECONSIDERATION AND FOR STAY OF MANDATE

Appellee, Chris Allen Fritz, by Martin Palmer and George W. Liebmann, his attorneys, moves for reconsideration of this court's decision pursuant to Maryland Rule 850 and for stay of issuance of the mandate and for reasons states:

1. As was stated at oral argument and as the annexed papers reveal, the husband and wife have reconciled and recurrence between the parties of this controversy is thus possible. The conclusion of mootness asserted in the prevailing opinion can be sustained only by quotation out of context of the decree below. The language in the decree replaced by the majority's dots is as follows:

"Subject to further order of court, AND IT IS FURTHER ORDERED that this court shall retain jurisdiction over the defendants in the above entitled matter." (E. 72). Since the case is not moot as between the parties, the applicability or inapplicability of the discretionary exception to the mootness rule announced in the *Lloyd* case does not arise.

2. Allegations of the plaintiff based on information received subsequent to oral argument and contained in the annexed affidavit strongly suggest the abortion here was performed after the wife was encouraged by representatives of the abortion clinic to appear there at an artificially early hour on Saturday morning to sequester herself from the possible effect of a reversing order entered by this court. The unsworn suggestion of mootness, filed by counsel in this action, the briefs of appellant, and the oral argument of appellant, each and all carefully avoided any disclosure to this court or the plaintiffs as to when the abortion at issue was performed, where it was performed, or who performed it.

3. The action of appellants in conducting an abortion with oral argument in the Court of Special Appeals only two days away could have been motivated by no purpose other than a willful effort to moot these issues in order to avoid a reasoned decision by the courts of this state, an effort accompanied by undue influence on the wife and disregard of normal standards of legal and medical practice. The unsworn suggestion of mootness does not even suggest that the defendant abortion clinic, as distinct from Mrs. Fritz, had no notice of this court's reversing order.

4. The record below was developed prior to any possible suggestions of mootness and the case throughout has partaken of the concreteness and adverseness which are the primary interests protected by this court's discretionary mootness doctrine. This court's decision thus stands as a signal to litigants in other similar cases that they may safely gain their way by evasion or defiance of undesired court decrees rather than their orderly or expeditious appellate review. It constitutes an announcement that this court will hear no evil and see no evil and will not undertake even the most rudimentary inquiry to ascertain that its orders and those of lower courts have not been willfully flouted. Henceforth, alleged constitutional rights, at least those expected to engage the sympathy of some members of this court, will be vindicated not through the legal process but through a regime of snatch and grab and devil take the hindmost. Having regard to the immunity conferred by the court upon the conduct of appellants here, it is plain that, to use the language of the *Lloyd* decision, "upon such

recurrence the same difficulty which prevented the appeal at hand from being heard in time was likely again to prevent a decision." The only circumstance that may be different in a future case is the absence of a compliant judge of the Court of Special Appeals but the risks of citation for contempt will not be great having regard to the understandable and appropriate reluctance of courts to punish women in these situations and this court's demonstrated lack of curiosity as to the compliance or noncompliance with the injunction by the abortion clinic. The majority opinion teaches lessons that are entirely at war with the rule of law, inconsistent with the equitable premise that wrongdoers not profit by the consequences of their wrongs, and destructive of public respect for the appellate process and the authority of all court injunctions.*

5. A second supervening circumstance further demonstrates the extent to which the issues in this case are "likely to recur frequently" and involve the urgency of establishing a rule of future conduct. As the petition and order and reports, attached hereto as Exhibit B, indicate, two days after the rendition by this court of its opinion, another case involving similar facts arose before the same court and continues to be litigated there without benefit of guidance from this court as to its appropriate treatment and disposition. There are at least five reported cases involving not dissimilar issues in other states arising in widely varying fact situations. As demonstrated in appellee's brief at 37, several law review articles discuss the potential cause of action and the publicity attaching to the instant case undoubtedly will cause other actions of the same kind to be instituted in Maryland. For these reasons, the decision of this court has occasioned substantial public outcry since it appears evident to all, whatever their sentiments about these much vexed issues, that this case does involve a controversy which is certain to recur, and recur frequently.

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*At the least, this court should require, prior to its disposition of this motion, pursuant to its powers under Maryland Rule P 2b the filing by the abortion clinic and its counsel of sworn affidavits relating to their knowledge as to the time, place of performance, and physician, if any, performing the abortion here.

6. The prevailing opinion in attempting to demonstrate the inapplicability of the *Lloyd* exception, declares "neither side in this case has advanced any argument based upon the Maryland statutory provisions regulating the performance of abortions presently codified as Maryland Code Section 20-207 through 20-214 of the Health General Article." This statement in the majority opinion is simply false and should not be allowed to stand. See the discussion at pages 54 through 56 of appellee's questions presented. The amicus curiae brief of the Maryland Abortion Rights League is devoted entirely to an effort to refute appellee's arguments based on the statutes and their policy. The Attorney General of Maryland filed an amicus curiae brief on another statutory issue. The stark issue presented by this case—whether there is an absolute right to an abortion where no health justification whatever is asserted as required by the severable statutes—is certain to recur given the practice of sex-selection abortions and mounting evidence of increasingly casual resort to the practice in the absence of health justifications suggested by the fact that nearly thirty percent of abortions nationally are now performed on women with a history of at least one previous abortion (appellee's brief at 58 and authorities there cited).

7. The dissenting opinion likewise requires reconsideration. It summarily suggests, citing only *Roe, Doe,* and *Danforth,* that this case, involving a balancing of spouses' interests and a record in which the wife tendered no justification for the abortion, is ineluctably determined by three earlier cases all of which disclaim any bearing on the issue. In *Roe v. Wade,* 410 U.S. at 165, n. 67, the Supreme Court declared in unmistakable terms "Neither in this opinion nor in *Doe v. Bolton* do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases and the Texas and Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances. " . . . we need not now decide whether provisions of this kind are constitutional." As for *Danforth,* it is to be noted that the Supreme Court objected to the statute there at issue because it "does much more than insure that the husband participate in the decision whether his wife should

have an abortion. The state instead has determined that the husband's interest in continuing the pregnancy of his wife always outweighs any interest on her part in terminating it irrespective of the condition of their marriage. The state accordingly has granted him the right to prevent unilaterally and for whatever reason the effectuation of his wife's and her physician's decision to terminate her pregnancy. This state determination not only may discourage the consultation that might normally be expected to precede a major decision affecting the marital couple but also and more importantly the state has interposed an absolute obstacle to a woman's decision." (428 U.S. at 70, n. 11). The present case, involving as it does not absolute veto, no preference of a husband's right which "always outweighs" the wife's interest, no demonstrated decision by a physician, and a mechanism which may, in some circumstances, such as this one, foster "consultation" bears no resemblance to *Danforth*. This opinion conspicuously fails to build a bridge between the authorities it cites and the result it attempts to decree. Though announcing a conclusion which will be and has already been eagerly seized upon, it provides no reasoning, convincing or unconvincing, in support of that conclusion. The law makes demands upon judges as well as upon litigants and the constitutional requirement of "an opinion in writing" contemplates more than an *ipse dixit*. The path not followed by the dissenting judges is the path marked out by Professor Freund thirty years ago:

> "We do not enjoy a superabundance of institutions engaged in the rational pursuit of truth and right . . . can any discipline be more valuable today than one that teaches us to look through the great antinomies that present themselves like gladiators for our favors—individualism and collectivism, liberty and authority secularism and clericalism—to look through them in order to discover the precise issue in controversy, the precise consequences of one decision or another, and the possibility of an accommodation by deflating the isms and narrowing the schisms? This is the task, and at its best, the accomplishment of the law, and particularly of the judges in constitutional law. A judge writing for the popular anthologies could readily compose an essay on the side of liberty of speech or on the side of public order;

but a judge devoted to his mission will resist the temptation. When he exposes the factors that trouble the judgment, strives for as particularistic a decision as he can make, and gives a reasoned elaboration, he is providing a lesson in the rational solution of human conflicts that is too precious to be jeopardized through disrespect."

(The Supreme Court of the United States at 189–90, Meridian Edition.)

9. No two opinions of this court in recent years are more inconsistent with that ideal than the opinions rendered by this court in the *Fritz* case so shortly after oral argument. There are multiple issues in this case. If the dissenters adhere to their view they would seem at a minimum under a duty to explain why this case is controlled by *Danforth* rather than by the principles of, for instance, *Scheinberg v. Smith*, 659 F.2d. 476 (5th Cir. 1981) sustaining a Florida statute requiring notification of a husband prior to the performance of an abortion. Candidly viewed, the instant case falls between these two cases and judgment it may well properly turn on other factors peculiar to it such as the Maryland statutes prohibiting non-therapeutic abortions and the absence of any tender of justification at all by the wife, any evidence of examination by a responsible physician or any identification of a physician who could be held responsible for a medical judgment.

10. Finally, there is the matter of the court's mandate. The mandate in virtually every other previously dismissed moot case has been simply "appeal dismissed, with costs [against the appellant]." *Lloyd v. Supervisors*, 206 Md. 44; *Banner v. Home Sales Co.*, 201 Md. 425; *Montgomery County v. Metropolitan*

District, 200 Md. 525; *Eberts v. Congressional Country Club*, 197 Md. 461.* Just why Mr. Frtiz should be obliged to bear the costs of this appeal when he neither took the appeal nor procured its dismissal on grounds of mootness caused by him is totally unexplained by the court which overrules sub silentio without any rationale its holding in *Baldwin v. Chesapeake & Potomac Telephone Co.*, 156 Md. 522 at 557:

> "The appellee will be required to pay the costs, because the granting of its motion to dismiss the appeal has made it unnecessary to inquire into the merits of the suit and the dismissal is based on an act of appellee performed after both the institution of the suit and the entry of the appeal."

The totally unrationalized and apparently carelessly prepared mandate, in the face of this court's prior precedent and practice, is simply an outrage which must be corrected if the appearance of partisanship is to be avoided.

CONCLUSION

The motion for reconsideration should be granted, the case set in for brief further argument on the merits, the mandate stayed and the judgment of the Circuit Court for Washington County affirmed with costs against appellant Hagerstown Reproductive Health Services.

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*See also *WSSC v. TKU Associates*, 281 Md. 125; *Public Defender v. State's Attorney*, 281 Md. 702, 703.

There follows a paper on in vitro fertilization written for the British Government by the world-renowned geneticist, Dr. Jerome LeJeune, of the University of Rene Descartes, Paris, France.

Dr. LeJeune successfully described the first chromosomal disease in the human species, the extra chromosome, number 21, typical of mongoloidism. For this work, he received the John F. Kennedy Award from the late president and the William Allen Memorial Medal from the American Society of Human Genetics and is a member of the American Academy of Arts and Sciences.

Dr. LeJeune forwarded this at the request of the writer because of the newness of the science, and, since this paper has not yet been set in print for actual publication, it is reproduced here prior to appearing in Britain with the permission of the author.

This paper, written by the scientist who is to the world of genetics as Einstein was to the world of physics, brings together in convenient form the latest scientific technology and thinking on in vitro fertilization.

APPENDIX C

TEST TUBE BABIES ARE BABIES

The feasibility of extra corporeal fecundation (also called in vitro fertilization) has experimentally confirmed our basic knowledge of the fundamentals of human reproduction. Beside this scientific achievement, the new techniques have opened possibilities which deserve careful investigation.

THE FUNDAMENTALS OF LIFE

Life has a very, very long history but each individual has a very neat beginning, the moment of its conception. As it has been amply demonstrated, the whole biology of vertebrates teaches us that ancestors are united to their progeny by a continuous material link, for it is from the fertilization of the female cell (the ovum) by the male cell (the spermatozoa) that a new member of the species will emerge.

The material link is the thread-like molecule of DNA. This ribbon, roughly one meter long, is cut into pieces (23 in man), and each segment is carefully coiled and packaged in the form of a little rod, clearly visible under the microscope, the chromosome.

As soon as the 23 maternal chromosomes encounter the 23 paternal chromosomes, the full genetic information, necessary and sufficient to spell out all the inborn qualities of the new individual is gathered.

Exactly as the introduction of a minicassette inside a tape recorder will allow the restitution of the symphony, the information included in the 46 chromosomes (the minicassettes of the life music) will be deciphered by the machinery of the cytoplasm of the fertilized egg (the tape recorder), and the new being begins to express himself as soon as he has been conceived.

The fact that the baby will develop himself for another nine months inside the womb is irrelevant to this point as in vitro fertilization has amply demonstrated.

THE TECHNICALITIES OF FECUNDATION

In natural conditions, the ripe ovum is expelled from the ovary by rupture of the follicle and is recuperated by the fallopian tube. Inside this tube it migrates toward the uterus and en route encounters the sperm which, among millions of others, will fertilize it.

At the end of the journey the fertilized egg, already dividing feverishly, and organizing itself in a minuscule embryo of one millimeter and a half of diameter, accommodates itself inside the uterine mucosa (nidation); around six to seven days after fertilization has taken place. There, firmly implanting itself thanks to its placenta, it will continue its growth until birth.

It is because normal fertilization occurs in a tube, with ovum and sperm floating freely inside the liquid, that test tube babies are possible. Indeed, in vitro fertilization uses a tube of glass instead of a tube of living tissue, but the process is, in other respects, identical.

Initially, the artificial fertilization outside the maternal body has been proposed to circumvent some cases of feminine sterility. It happens that sometimes the fallopian tubes are blocked, most often as a sequella of a sexually transmissible disease. In such cases, the spermatozoa cannot reach the egg nor can the egg reach the uterus. To circumvent this block, the ripe egg is taken out by laparoscopy and put into a vessel containing appropriate medium. Addition of sperm will lead to fertilization.

The early embryo will be delicately transferred a few days later, through the cervix of the uterus so that it can pursue its development in the womb.

All of this explains why Dr. Edwards and Dr. Steptoe could witness, in vitro, the very beginning of the exceedingly young Louise Brown who they replaced a few days later in the womb of her mother. Thanks to the fundamentals of life already known, they were totally assured that this little berry-looking being could not be a tumor nor an animal.

With the hundreds of cases already described in various countries of the world, a double evidence is now available, and for the first time, in our own species. The early human embryo is developing itself by its own virtue and it has an incredible viability.

VIABILITY OUTSIDE THE WOMB

That the early human being is fully viable outside the maternal body is not a surprise but a confirmation of general principles.

Even in ordinary conditions, with a rather simple culture medium (the fluid of the fallopian tube), the early human embryo can pursue its own destiny for days, maybe a week, and manage its own organization; after one week, implantation is a necessity but the viability of the early human being is such that even the uterine mucosa is not a prerequisite.

Up to two months, implantation inside the fallopian tube is fully efficient. In these extra-uterine pregnancies, the tiny human being, smaller than the thumb, is perfectly developed. The only danger being that his continuous growth would rupture dramatically the walls of the tube which cannot extend as a uterus would. Even in the extreme case of extra-genital pregnancies, when the fetus anchors itself in the abdominal cavity, directly on the peritoneum, the growth can be astonishly normal for many months.

Protected by his life capsule (the zona pellucida first and, later, the amniotic bag he constructs around himself) the early human being is just as viable and autonomous as an astronaut on the moon; refueling with vital fluids is required from the mother ship.

A purely artificial fluid supplier has not yet been invented. But if it were ever possible, complete development outside the womb would ensue. Such "ectogenesis" would be the utmost proof that an embryo or a baby belongs to himself. If the bottle would argue that this baby is my property, no one would believe the bottle.

TIME AT A STANDSTILL

Careful refrigeration of living cells, protecting their precious molecular edifice, is of common use for long preservation. At a very low temperature (−190c in liquid nitrogen), the vibrations of the atoms are quite restricted. So to speak, time is suspended.

Frozen sperm can thus be kept for years. If thawed precautiously, they fully recover their fate of intrepid navigators. Banks of sperm are a common tool of industrial breeding.

The same is true for early embryos. Some mouse embryos, deep frozen and thawed, have managed, after implantation, to develop themselves into perfectly normal mice. No such experiment has yet been reported in our species; proposals are numerous, although their legitimacy is at least questionable.

TWINS AT WILL

If the zona pellucida is split and the embryo cleaved in two halves, each mass can be inserted in a separate zona pellucida.

Identical twins have thus been produced, in cattle and in sheep. Some have proposed to do the same in man. Their rationale is not "a production line" but the possibility of checking the genetic make-up of one of the twins. The scenario goes as follows: one of the twins is deep frozen, until further transfer at the proper time, in a recipient uterus. The other twin is allowed to grow for awhile and is then examined for its chromosomal constitution, normality of growth, and its various chemical properties. The spared twin will then be transferred if the sacrificed one is declared to be alright. If it is not, the spared one will not be spared any longer. Supposedly, this procedure will give full insurance of a successful childbearing, even for an at-risk mother (for chromosomal or genic disease).

Simple arithmetic (see annex I) is not so optimistic. A success rate better than a few percent can hardly be expected. As a mean, the egg donor should be tapped some twenty times for each successful pregnancy; an extremely heavy burden, not to speak of the 20 to 40 embryos who would not survive the whole experiment!

WOMBS FOR HIRE

If properly kept in suspended life, (for there is no synchrony of ovarian cycles in the population), an early embryo could be transferred anytime in any recipient uterus. For example, a widow could accommodate a spared embryo fathered long ago by her departed partner. A candidate, affected by an inheritable disease, would welcome an egg from a healthy donor. A uterine foster mother could be hired if the true mother could not, for medical reasons, assume the pregnancy. Possibly a carrier woman could thus avoid the inconveniences of the pregnant state.

Surrogate pregnancy is a difficult issue. Should the foster mother be forced to give back the baby nine months later? Should she be deprived the right of voluntary termination of pregnancy if abortion is legal in her country? These questions are for lawyers. For the biologist, no matter what the avowed pretext, such practices would break the only assured link between generations. Up to now, in spite of all the uncertainties of the passion, motherhood was, at delivery, an absolute certainty.

Sure enough, the technique works in cattle. But, what is good for calves may not be good enough for children or mothers.

MANIPULATED EMBRYOS

The full viability of the early being and its thrive to life allow many experiments.

The cells of two different embryos can be mixed together. They thus cooperate in the making of a compound animal (called a

chimera). To the best of our actual knowledge, no compound mouse has yet been obtained from more than three cell lines mixed together.[2] During the first cleavages of the fertilized egg, there is an odd stage of three primordial cells. Maybe this three-cells stage has something to do with the individuation process.

It must be remembered that normally the zona pellucida prevents these admixtures. In a sense, this bag ensures our early private life. It is an open possibility that normally the human embryo hatches out of its zona pellucida only when its biological individuality is so strongly established that a chimeric accident is no longer to be feared.

But even if the mixing must be restricted to two or three cell lines, what about an "artistic" embryo, an "athletic" embryo, and a "scientific" one fused together? Would not that create a kind of superman?

Or, if DNA manipulation comes in, what about embryos receiving special sequences, producing exceptional endowments?

These fictional experiments do not deserve discussion. These nursery tales for grown ups can be rejected easily. To devise a man wiser than we are, we should be already wiser than we can be!

As for the proposals of manipulating embryos in order to recuperate spare parts for repairing children or adults, they are so farfetched that no critical analysis can be made. Conceivably, grafts of stem cells could be of theoretical interest. They are already taken from voluntary donors (bone marrow graft, for example). In any event, specialized tissues are not yet detectable in pre-implantation embryos.

A SEX OF CHOICE

As BRUNGS stated abruptly about the advent of generalized contraception and, later, of efficient in vitro fertilization, we have gone "from sex without babies, to babies without sex." But, the sex of the baby still matters.

The choice of the king is a son for the first child and often for the second. The same is true for the layman, even for the suffragettes and now the feminists. All the opinion polls give the same answer: If free choice were given, a formidable excess of males would result!

Fortunately no sieve is available to preferentially select the male sperms (carriers of the Y chromosome). Also the pre-sexing of the embryo is quite out of sight.

If an acceptable technique was some day available, the State could not remain indifferent in the face of such a foreseeable disaster—a woman-deprived population! Not to infringe upon the free choice and not to favor anyone, enormous computers would process the demands, producing optimal decisions. As demonstrated by GROUCHY[3] the best algorithm is not too cumbersome to calculate—toss a coin like before!

THE VERY QUESTION

But have we asked the appropriate question? If our only goal is to help women who cannot engender because of tubal difficulties, have we chosen the right track?

Let us return to technicalities. If, in reality, the early embryo is not an experimental material to be split, mixed, and manipulated, what is the interest of this trip of a few days in the outside world?

Dr. CRAFT and his colleagues have already shown that the fertilized ovum can be implanted in the womb right away.[4] Could we not go even closer to physiological process? Possibly the egg could be placed in the uterus during the laparoscopy, the sperm already being supplied by normal intercourse?

Why not study closer the fluid of the fallopian tube? Would it not be the best medium for the early development?

Research workers would be very wise to explore new avenues rather than automatically following the long detour of in vitro fertilization.

THE FUTURE OF MEDICINE

Repeatedly, arguments have been put forward that in vitro fertilization would help cure a whole array of diseases, even breast cancer! But all the available evidence points toward other directions of research as shown by three recent examples.

Among the genetic scourges afflicting humanity, mental retardation is the most inhumane; it deprives patients of one of the most precious parts of our patrimony, the full power of thought.

Some ten percent of the mentally retarded show a peculiar fragility of the X chromosome. Numerous examinations have shown that this fragility can be healed if the cells are cultivated in medium containing various chemicals—a simple vitamin or folic acid and its derivatives are especially efficient.[5] If it is added to the regimen of the patients, their X chromosome gap seems to disappear as well. Moreover, preliminary clinical trials show that their mental status can be ameliorated partially.[6]

The cure of the disease is not already at hand, but this is the first time that a chromosomal disease and its deleterious consequences can be attacked without restorting at all to science fiction devices.

Another terrible disease resulting from imperfect closure to the neural tube in embryonic life seems also to be sensible to vitaminotherapy. As demonstrated by SMITHELLS[7] et al and confirmed by LAURENCE[8] et al, vitaminotherapy, including folic acid, given in appropriate time to the mother at risk diminish drastically the frequency of spina bifida. Here, again, no experiment on the embryo is required.

A third advance has been made on genetically transmitted anemias.

During in utero life, hemoglobin is produced by an array of different genes working one after the other; the first during the embryonic stage, the second in the fetus, and the third in the

whole adult life. If this last gene is mutated, an abnormal hemoglobin is made (like in thalassemias or in sickle-cell anemia).

It happens that the silent genes can be "woken up" by a special chemical (azacytidine) (LEY et al)[9] and take advantage of this property so that their patients, rather than suffering from their abnormal adult-type hemoglobin, started producing again their normal fetal type. This kind of rejuvenation could be of great significance for therapy, without any manipulation of embryos or the fetus.

ALDOUS HUXLEY, WOLFGANG GOETHE, AND THE NEWSPAPERMAN

A last question remains: Why is in vitro fertilization such a fascinating issue? Although the *Brave New World* is often quoted in this context, it is probably not the industrial production line of identical twins which is the key point. At least Aldous Huxley himself stressed another phenomenon. In this technological society, liberated of every taboo, the various dirty words were of current usage. Nevertheless, the editors were obliged to reprint all the literature in order to expurgate it of the only incongruity which could not be pronounced and should not even be read and was to be replaced by suspension points—the word "mother."

Motherhood, a pure obscenity and an inversion of the values, is a supreme danger Aldous Huxley has warned us.

But another author, one of the greatest poets, more than a century and a half ago saw much further away. With the damnation of Dr. Faust, Goethe told of the tragic abandonment of the beloved, seduced and pregnant. In the Second Faust, the vision goes even deeper. After his pact with Mephistopheles, Faust comes back to his old laboratory with his diabolic companion. They watch the successor of Faust producing an homonculus inside an alchemic vessel! The tiny creature escapes and floats in the air around the head of Dr. Faust, who, guided as he is by this strange dream baby, has definitely lost his mind but not his imagination.

After impossible love with the ghost of Helen of Troy, Faust finally accomplishes his goal. He builds an empire, a fully technical society, with the magic help of Mephisto. At the very end, he gives his last orders—to silence the little church bell, the only one still ringing in his whole empire, and to destroy the little cabin in which Philemon and Baucis are still the paragon of human love.

And when the silence comes, when Mephisto returns after having burned the old lovers in their cabin, then, implacably sorrow invades the heart of the doctor.

Poets are beyond science. They see it from far away, but they feel much more than technicians could ever grasp. In such important matters, it would possibly be very profitable for scientists and legislators to read again the great authors.

But maybe they could rely as well on other writers who are much more accessible and living among us, the newspapermen. They also do not make science but see it from outside, but their judgment is not taken lightly. They know that in vitro fertilization fascinates their readers, and one journalist understood why. Trying to convey all the significance of what was going on, he coined the term "test-tube baby." Sure enough, scientists objected (they had overlooked it), but the journalist knew better.

If any exploitation of the early human embryo is intrinsically repugnant, if everyone feels that those conducting experiments must absolutely respect these marvelously young human beings, it is for a scientific reason that a newsman discovered an intuition of genius—test-tube babies *are* babies.

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ANNEX

Tentative estimation of the success rate of the whole process of implantation of a defrosted embryo after artificial twinning and genetic check-up of its sacrificed co-twin.

This process has five independent steps. The total likelihood is thus the product of the individual probabilities of success for each event.

1) Successful recovery of the egg by laparoscopy and in vitro fertilization.

Let us take a 90 percent chance of success, which seems a rather high standard.

2) Splitting of the zona pellucida, splitting of the embryo, accommodation of each would-be twin in a new zona pellucida with good chances of survival of the two.

Let us take the very optimistic view that both twins do quite weil in 50 percent of the cases. (The records in animals are not that high by far.)

3) Successful genetic check-up of the sacrificed twin after tissue culture and biochemical control.

Let us suppose 90 percent are successes, a rate difficult to attain in examinations after amniocentesis in the second trimester of pregnancy.

4) Successful freezing and thawing of the spared embryo.

No estimate can be given for it has not yet been reported in man. Let us take the optimistic view of 50 percent. Such a success rate has never been reported in experimental animals, by far.

5) Healthy development to full term of the spared embryo after its transfer in utero.

A value of 25 percent can be assumed as a very favourable one, considering the available statistics published.

All together, the likelihood of the whole process is: $p = 0{,}90 \times 0{,}50 \times 0{,}90, 0{,}50 \times 0{,}25 = 0{,}05$.

Although this value of five percent is disputable, mainly because steps 2 and 4 are yet unknown, it can hardly be argued that it is a deliberate underestimate. Very likely, the chance of success of the full procedure would be quite a bit lower.